

Maja Blumer

Tort Liability for Infringements on the Right of Reputation under Chinese Law – A Review of Selected Court Cases

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10/2016

**Fajus Research Paper Series
on Chinese and East Asian Law**



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Reputation under Chinese Law – A Review of Selected
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No. 1 (10/2016)

Published by:
Fajus Verlag GmbH
Seestrasse 175
8712 Staefa (Zurich)
Switzerland
E-mail: info@fajus.com
Website: <http://www.fajus.com>

ISBN 978-3-906107-25-7 (Print Edition)

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This paper was first published in Jusletter of June 27, 2016. The PDF-version of this paper is available free of charge on the website of Fajus (www.fajus.com) and on various open-access research repositories,

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I. INTRODUCTION

It barely made the news in Western countries: Chen Wenyong (陳文英), the mother of Zeng Feiyang (曾飛洋), is suing the Chinese state media agency Xinhua to redeem the honor of her son, a labour lawyer¹. Zeng Feiyang was arrested in December 2015, likely because he organized several strikes with the Panyu Workers Association. While it is still unknown whether and when his case will go to trial, the accusations against him were already widely spread in the media under the control of the state². For instance, a lengthy report of Chinese Central TV (CCTV) issued on December 22, 2015, accuses him not only of organizing several strikes but also of other criminal or unethical behaviour like fraud, adultery, and embezzlement³. The chances of those accusations withstanding scrutiny are slim. But does Mrs. Chen, who is, by the way, already 70 years old, stand a chance of winning against the influential state media?

While appearing to be rather trivial, right of reputation cases like the one of Mrs. Chen merit some attention, on one hand because they concern the core of a persons' everyday life, on the other hand because they show the workings of the rule of law in general and tort law in particular very well, as usually conflicting interests need to be balanced and immaterial damages occur.

II. HISTORICAL BACKGROUND

Although in China modern laws protecting the right of reputation (名譽權, *míngyù quán*) only emerged in the 1980ies, according legal rules have been present throughout Chinese legal history. Reportedly, the Xia Dynasty (c. 2070 – c. 1600 B.C.) knew three crimes punishable by death: Slander (昏, *hūn*), corruption (墨, *mò*), and murder (賊, *zéi*)⁴. The concepts of honor and reputation were also subject to musings by philosophers like Xunzi (荀子, c. 400 B.C.) and Confucius (孔子, *Kǒngzǐ*, 551 B.C. – 479 B.C.)⁵. The protection of honor

1 See <https://theinitium.com/article/20160422-mainland-workersright/> (last visited April 25, 2016).

2 Such trials through the media, often with staged confessions of the accused, are quite common in the PRC.

3 See http://news.xinhuanet.com/2015-12/22/c_1117546098.htm (last visited April 25, 2016).

4 SUN, Chinese Legal History, p. 6.

5 QI, Zivildrechtlicher Ehrenschtutz, p. 25.

and one's reputation was crucial in China's hierarchical feudal society through centuries, not to say milleniums. Even today, the Chinese are known to attach tremendous importance to giving and keeping 'face' (面子, *miànzi*).

When a new civil law was drafted in the late years of the Qing Dynasty (清朝, *Qīngcháo*), provisions regarding the right of reputation were included, naturally, even though the blueprint for the draft, the German BGB, was much more reluctant in that aspect⁶. However, after the fall of the Qing Dynasty in 1911, modern laws could not be established permanently in China due to decades of war and civil unrest.

When the Chinese Communist Party (共产党, *Gòngchǎndǎng*) took power in 1949, it abandoned all laws issued by the bourgeois Kuomintang (国民党, *Guómíndǎng*)⁷. As the communist regime failed to introduce civil legislation in the following years, there was no protection to the right of reputation up to the early 1980ies, when a Criminal Code⁸, a new constitution⁹ and the General Principles of Civil Law¹⁰ were introduced.

Protecting one's reputation might be more important than ever in China. For instance, in 2015, the Chinese Government introduced its plans to establish a Social Credit System by 2020¹¹. Apparently, every Chinese citizen's economic and social status is to be rated based on commercial activities, social behaviour, and judicial record. For the time being, the system is being tested

6 Qi, *Zivilrechtlicher Ehrenschutz*, p. 25.

7 中共中央关于废除国民党的六法全书与确定解放区的司法原则的指示, *Zhōng Gòng Zhōngyāng guānyú fēichú Guómíndǎng de liùfǎ quánshū yǔ quèdìng jiěfàngqū de sīfǎ yuánzé de zhǐshì*, Instructions of the Central Committee of the CPC regarding the abolishment of the Six Codes of the Kuomintang and the principles for the definition of new legal principles for the liberated areas (February 1949).

8 The first comprehensive Criminal Code of the PRC was introduced in 1979; before that, various administrative rules, regulations and orders containing penal provisions were the only criminal law available (CHEN, *Chinese Law*, p. 168 Fn. 4).

9 The current Constitution of the PRC (中华人民共和国宪法, *Zhōnghuá Rénmín Gònghéguó xiànfǎ*) dates from 1982 and was revised in 1988, 1993, 1999, and 2004. Previous constitutions date from 1954, 1975, and 1978. For details see Chapter III below.

10 The General Principles of Civil Law of the PRC (中华人民共和国民法通则, *Zhōnghuá Rénmín Gònghéguó mínfǎ tōngzé*) were adopted in 1986 and came into force in 1987.

11 社会信用体系建设规划纲要, *Shèhuì xìnyòng tǐxì jiànshè guīhuà gāngyào*, Planning Outline for the Construction of a Social Credit System (2014-2020). For English translation and original Chinese text of the outline see <https://chinacopyrightandmedia.wordpress.com/2014/06/14/planning-outline-for-the-construction-of-a-social-credit-system-2014-2020/> (last visited April 25, 2016).

in pilot projects like ‘Sesame Credit’ established by the giant online shopping platform Alibaba. Once the system is compulsory (likely in 2020), every Chinese citizen will have to be careful to protect his reputation as computed into his social credit score.

III. LEGAL FRAMEWORK

A. Introduction

In present-day China, the right of reputation is (at least in theory) protected in three ways: By the Constitution, by Criminal Law and through civil laws such as the General Principles of Civil Law and Tort Liability Law. Constitutional and Criminal Law are only briefly discussed here. For various reasons¹², constitutional rights are rarely invoked in court proceedings¹³. As for the Criminal Law, it is safe to assume that Chinese prosecutors have better things to do than to pursue infringements on the right of reputation. Hence, civil remedies are of great importance for the protection of the right of reputation.

B. Constitutional and Criminal Law

1. Constitutional Law

The right of reputation is widely seen as one of the fundamental human rights. The Declaration of Human Rights, promulgated by the United Nations General Assembly in December 1948 states in its Article 12 that

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

12 The main reason is the fact that the courts do not have the right to interpret the Constitution, or, as a matter of fact, any other law.

13 In detail see CHIN, Defences, p. 5 et seq.

Although the first Constitution of the PRC¹⁴ was only introduced six years later, in 1954, and despite the fact that it contains quite an extensive catalog of fundamental rights of the citizens (Article 85 et seq.), the right of reputation was not included. The same goes for the short-lived third Constitution issued shortly after the end of the Cultural Revolution in 1978 (Article 44 et seq.)¹⁵, not to mention the second Constitution of 1975¹⁶ which barely contained any provisions beyond the right and duty of citizens to support the leadership of the Communist Party¹⁷. Only in 1982, the right of reputation was introduced as a constitutional right. Article 38 of the current Chinese Constitution¹⁸ contains the following provision¹⁹:

The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.

14 English Translation available at www.hkpolitics.net/database/chicon/1954/1954ae.pdf.

15 English Translation available at https://upload.wikimedia.org/wikipedia/commons/4/4e/People%27s_Republic_of_China_1978_Constitution.pdf.

16 English Translation available at <http://www.e-chaupak.net/database/chicon/1975/1975e.htm#d>.

17 Art. 26 (1) 1975 Constitution.

18 English Translation of the 1982 Constitution (中华人民共和国宪法, *Zhōnghuá Rénmín Gònghéguó xiànfǎ*) available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

19 中华人民共和国公民的人格尊严不受侵犯。禁止用任何方法对公民进行侮辱、诽谤和诬告陷害。 *Zhōnghuá Rénmín Gònghéguó gōngmín de réngé zūnyán bù shòu qīnfǎn. Jìnzhǐ yòng ránhé fāngfǎ duì gōngmín jìn xíng wūrǔ, fěibàng hé wūgào xiàn-hài.*

2. Criminal Law

Article 246 of the Chinese Criminal Law²⁰ of 1997 as last amended on August 29, 2015, reads as follows²¹:

Whoever, by violence or other methods, publicly humiliates another person or invents stories to defame him, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights, if the circumstances are serious.

The crime mentioned in the preceding paragraph shall be handled only upon complaint, except where serious harm is done to the public order or to the interests of the State.

Where information networks are used to commit the conduct in Paragraph 1 and a victim makes a complaint to a People's Court, but proves to have difficulties in providing evidence, the People's Court may request that the public security organs provide assistance.

For obvious reasons, infringements on the right of reputation must be of rather serious nature to be subject to criminal prosecution (compare Paragraph 1

- 20 Chinese and English text of the Criminal Code of the PRC (中华人民共和国刑法, *Zhōnghuá Rénmín Gònghéguó xíngfǎ*) available at http://www.npc.gov.cn/wxzl/wxzl/2000-12/17/content_4680.htm and http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm, respectively. For the recent 9th amendment promulgated on August 29, 2015, which includes the addition of Para. 3 of Art. 246 Criminal Code see <http://npc.people.com.cn/n/2015/1126/c14576-27857512.html> and <http://chinalawtranslate.com>, respectively.
- 21 以暴力或者其他方法公然侮辱他人或者捏造事实诽谤他人，情节严重的，处三年以下有期徒刑、拘役、管制或者剥夺政治权利。
前款罪，告诉的才处理，但是严重危害社会秩序和国家利益的除外。
通过信息网络实施第一款规定的行为，被害人向人民法院告诉，但提供证据确有困难的，人民法院可以要求公安机关提供协助。
Yǐ bàoli huòzhě qítā fāngfǎ gōngrán wǔrǔ tārén huòzhě niēzào shìshí fěibàng tārén, qíngjié yánzhòng de, chù sān nián yǒuxíng, yòuqī tǔxíng, jǔyì, guǎnzhì huòzhě bōdúo zhèngzhì quánlì.
Qiánkǎn zuì, gàosu de cái chǔlǐ, dànshì yánzhòng wēihài shèhuì zhìxù hé guójiā lìyì de chúwài.
Tōngguò xìnxīwǎng lào shìshí dì yī kuǎn guīdìng de xíngwéi, bèihàirén xiàng rénmin fǎyuàn gàosu, dàn tígōng zhèngjù què yǒu kùnnan de, rénmin fǎyuàn kěyǐ yāoqiú gōng'ān jīguān tígōng xiézhù.

of Article 246 Criminal Law), and even then, it will usually only be undertaken upon complaint (compare Paragraph 2 of Article 246 Criminal Law).

The newly added provision in Paragraph 3 of Article 246 Criminal Law may be of some help, but then, one wonders how it is possible for libellous content to be distributed via the internet and social media, given the strict monitoring of all activities through the Chinese cyber police.

C. Civil Law

1. General Principles of Civil Law

Article 101 of the General Principles of Civil Law (GPCL)²² protects the right of reputation:

Citizens and legal persons enjoy the of right of reputation, meaning their personality is protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons is prohibited²³.

Like most provisions in the GPCL, the aforementioned clause is of rather general, conceptual, and declaratory nature and fails to address the core issues at hand²⁴.

The text of the law is also rather vague as to the remedies for infringements on the right of reputation. Basically, the remedies are listed in Article 120 GPCL, which states the following²⁵:

22 中华人民共和国民法通则, *Zhōnghuá Rénmín Gònghéguó mǐnfǎ tōngzé*, available at http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm (Chinese Version) and http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm (English Version), respectively.

23 公民、法人享有名誉权, 公民的人格尊严受法律保护, 禁止用侮辱、诽谤等方式损害公民、法人的名誉。

Gōngmín, fǎrén xiǎngyǒu míngyùquán, gōngmín de réngé zūnyán shòu fǎlù bǎohù, jìnzhǐ yòng wǔrǔ, fěibàng děng fāngshì sǔnhài gōngmín, fǎrén de míngyù.

24 CHIN, Defences, p. 8.

25 公民的姓名权、肖像权、名誉权、荣誉权受到侵害的, 有权要求停止侵害, 恢复名誉, 消除影响, 赔礼道歉, 并可以要求赔偿损失。

法人的名称权、名誉权、荣誉权受到侵害的, 适用前款规定。

Gōngmín de xìngmíng quán, xiǎoxiàng quán, míngyù quán, róngyù quán shòudào

If a citizen's right of personal name, portrait, reputation or honor is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made; he may also demand compensation for losses.

The above paragraph shall also apply to infringements upon a legal person's right of name, reputation or honor.

Like the abovementioned clauses, Article 120 GPCL leaves a few open questions relating to the right of reputation, namely:

- (1) How is the compensation for losses to be determined?
- (2) Is there to be compensation due for moral damages? How is it calculated?
- (3) Are there any valid excuses for infringing upon another person's right of reputation?

Additionally, Article 120 GPCL, while still in force, is to some degree overruled by the provisions of the Chinese Tort Liability Law²⁶.

Given the ambiguity of the legal provisions, to determine the scope of the right of reputation, it may be useful to turn to case law (discussed in Chapter X).

2. Tort Liability Law

The Tort Liability Law of the PRC (TLL)²⁷ was adopted in December 2009 after decades of legal discussion, and came into force in July 2010. Previously, tort liability was regulated by a few clauses in the GPCL.

To begin with, personal rights and interests are mentioned in the list in Article 2 Tort Liability Law²⁸:

qīnhài de, yóuquán yāoqiú tíngzhǐ qīnhài, huǐfù míngyù, xiāochú yǐngxiàng, péilìdàoqiàn, bìng kěyǐ yāoqiú péicháng sùnsī.

Fǎrén de míngchēng quán, míngyù quán, róngyù quán shòudào qīnhài de, shìyòng qiánkǎn guīdìng.

26 The Tort Liability Law will be discussed in the following chapter.

27 中华人民共和国侵权责任法, *Zhōnghuá Rénmín Gònghéguó qīnquán zérèn fǎ*.

28 侵害民事权益, 应当依照本法承担侵权责任。

本法所称民事权益, 包括生命权、健康权、姓名权、名誉权、荣誉权、肖像权、隐私权、婚姻自主权、监护权、所有权、用益物权、担

One who violates rights and interests protected by civil law shall bear tort liability in accordance with this law.

The rights and interests protected by this law encompass the right to life, the right to health, the right of name, reputation rights, honorary rights, the rights to one's image, the right to privacy, the right to marital autonomy, the right to guardianship, ownership rights, usufruct, copyright, patent rights, exclusive rights to use trademarks, discovery rights, equity rights, inheritance rights, and other rights and interests.

The remedies listed in Art. 15 TLL also apply to infringements on personal rights such as the right of reputation²⁹:

保物权、著作权、专利权、商标专用权、发现权、股权、继承权等人身、财产权益。

Qīnhài mínshì quán yì, yīngdāng yīzhào běn fǎ chéngdān qīnquán zérèn.

Běn fǎ suǒ chēng mínshì quán yì, bāokuò shēngmìng quán, jiànkāng quán, xìngmíng quán, míngyùquán, róngyùquán, xiàoxiàngquán, yīnsīquán, hūnyīn zìzhǔ quán, jiānhùquán, suǒyǒuquán, yòngyìwùquán, dānbǎowùquán, zhùzuòquán, zhuānliéquán, shāngbiāozhuānyòngquán, fāxiànquán, gǔquán, jìchéngquán děng rénshēn, cáichǎn quán yì.

29 承担侵权责任的方式主要有：

- (一) 停止侵害；
- (二) 排除妨碍；
- (三) 消除危险；
- (四) 返还财产；
- (五) 恢复原状；
- (六) 赔偿损失；
- (七) 赔礼道歉；
- (八) 消除影响、恢复名誉。

以上承担侵权责任的方式，可以单独适用，也可以合并适用。

Chéngdān qīnquán zérèn de fāngshì zhǔyào yǒu:

(yī) tíngzhǐ qīnhài;

(èr) páichú fāng'ài;

(sān) xiāochú wēixiǎn;

(sì) fǎnhuán cáichǎn;

(wú) huīfù yuánzhuàng;

(liù) péicháng sùnsǐ;

(qī) péilǐdàoqiàn;

(bā) xiāochú yǐngxiǎng, huīfù míngyù.

Yīshàng chéngdān qīnquán zérèn de fāngshì, kěyǐ dāndú shìyòng, yě kěyǐ hébìng shìyòng.

The principal ways of bearing tort liability are:

1. stopping the infringement
2. removing impediments
3. eliminating the danger
4. returning the property
5. restoring something to its original condition
6. paying compensation for the loss
7. making a formal apology
8. eliminating ill effects and rehabilitating a person's reputation

The abovementioned ways of bearing tort liability may be applied singly or in combination.

Rules as to payment for actual damages are contained in Art. 20 TLL³⁰,

If one violates another person's personal rights and interests, the tortfeasor shall pay compensation according to the loss suffered by the victim. If that loss cannot be determined without difficulty, the tortfeasor shall give compensation according to the gain he obtained. If neither the gain of the tortfeasor nor the loss of the victim can be determined, then compensation according to the circumstances shall be given by the People's Court at the request of the victim.

30 侵害他人人身权益造成财产损失的，按照被侵权人因此受到的损失赔偿；被侵权人的损失难以确定，侵权人因此获得利益的，按照其获得的利益赔偿；侵权人因此获得的利益难以确定，被侵权人和侵权人就赔偿数额协商不一致，向人民法院提起诉讼的，由人民法院根据实际情况确定赔偿数额。

Qīnhài tārén rénsēn quán'ì zàochéng cáichán sǔnshī de, ànzhào bèi qīnquán rén yīncǐ shòudào de sǔnshī péicháng; bèi qīnquán rén de sǔnshī nányǐ quèdìng, qīnquán rén yīncǐ huòdé lìyì de, ànzhào qí huòdé de lìyì péicháng; qīnquán rén yīncǐ huòdé de lìyì nányǐ quèdìng, bèi qīnquán rénhé qīnquán rén jiù péicháng shù 'é xiéshāng bù yīzhì, xiàng rénmín fǎyuàn tíqǐ sùsòng de, yóu rénmín fǎyuàn gēnjù shíjì qíngkuàng quèdìng péicháng shù 'é.

while emotional damages are covered by Art. 22 TLL³¹:

A tortfeasor who violates another person's personal rights and interests and thereby causes serious emotional damage, has to compensate the victim for the consequent emotional loss at the request of the victim.

It is to be noted that compensation for emotional damages may only be awarded if 'serious damage' has occurred. The TLL doesn't give any specifics as to what is to be understood by 'serious emotional damages', nor does it state precise guidelines for calculating monetary compensation for emotional damages. Hence, the courts enjoy a considerable amount of discretion when deciding on monetary compensation in case of an infringement on personal rights.

3. Interpretations of the Supreme People's Court

A particularity of the Chinese court system is the fact that the Supreme People's Court is rather idle in terms of actually handling cases. Under the principle of "four levels and two instances of trials" only cases that start with the High People's Court – the third level – may be appealed against at the Supreme People's Court.

Cases from the Basic People's Court and the Intermediate People's Court – the first and the second level – never end up with the Supreme People's Court, whatever their importance may be. The majority of cases start at one of the two lower levels³². Hence, the Supreme People's Court passes its time with handing out "Interpretations", in which the laws are elaborated on, and compiling a collection of exemplary cases³³.

31 侵害他人人身权益，造成他人严重精神损害的，被侵权人可以请求精神损害赔偿。

Qīnhài tārén rénshēn quányì, zàochéng tārén yánzhòng jīngshén sǔnhài de, bèi qīnquán rén kěyǐ qǐngqiú jīngshén sǔnhài péicháng.

32 This is especially true for right of reputation cases which as a rule are tried at the Basic People's Court as first instance court.

33 The SPC started issuing so called Guiding Cases in 2010, for the entire collection including English translations see <https://cgc.law.stanford.edu/>. Only five cases regarding the GPCL have been published so far, none of which has touched upon the right of reputation. Furthermore, a few cases are published in the SPC Gazette, some of which will be discussed below.

In the case of the GPCL, the SPC gave its first explanations in 1988, a year after the law had entered into force, in the “Opinions of the SPC on the Implementation of the Principles of the Civil Law of the People’s Republic of China”³⁴.

As to the right of reputation, it has been explained to a certain degree in No. 140 of the 1988 Opinions which contains the following statement³⁵:

In case anyone propagates against the privacy of any other person in writing or orally, or fakes facts to uglify the personality of other person overtly, or damages other person’s reputation by ways of insulting and slandering, which results in a certain influence, such act shall be determined as an act infringing on the citizen’s right of reputation.

In sum, the statement of the SPC doesn’t give the reader much of a clue as to what the right of reputation means. Rather, the highest court introduces a number of terms that are themselves in desperate need of clarification. For instance, the terms of ‘privacy’ and ‘reputation’, ‘slandering’ and ‘insulting’ seem to be intermixed. The means of violating another’s reputation seem to be straightforward (in writing, orally or by faking facts) at a first glance, but does the term ‘writing’ include electronic ways of communication such as Weibo, the Chinese version of Twitter?

The handling of right of reputation cases by courts has been explained in the “Interpretation of the SPC on the Trial of Cases Concerning the Right of Reputation”³⁶ (1998) in a Q&A-format. It encompasses the following topics:

34 最高人民法院关于贯彻执行《中华人民共和国民法通则》若干问题的意见, *Zuìgāo rénmin fǎyuàn guānyú guàncè zhíxíng «Zhōnghuá Rénmín Gònghéguó mǐnfǎ tōngzé» ruògān wèntí de yìjian*.

35 以书面、口头等形式宣扬他人的隐私,或者捏造事实公然丑化他人人格,以及用侮辱、诽谤等方式损害他人名誉,造成一定影响的,应当认定为侵害公民名誉权的行为。

以书面、口头等形式诋毁、诽谤法人名誉,给法人造成损害的,应当认定为侵害法人名誉权的行为。

Yǐ shūmiàn, kǒutóu děng xíngshì xuān chāng tārén de yīnsī, huòzhě niēzào shìshí gōngrán chòuhuà tārén réngé, yǐjī yòng wūrǔ, fěibàng děng fāngshì sūnhài tārén míngyù, zàochéng yīdìng yǐngxiǎng de, yīngdāng rèndìng wèi qīnhài gōngmín míngyù quán de xíngwéi.

Yǐ shūmiàn, kǒutóu děng xíngshì dǐhuǐ, fěibàng fǎrén míngyù, gěi fǎrén zàochéng sūnhài de, yīngdāng rèndìng wèi qīnhài fǎrén míngyù quán de xíngwéi.

36 最高人民法院关于审理名誉权案件若干问题的解释, *Zuìgāo rénmin fǎyuàn guānyú shěnlǐ míngyùquán ànjàn ruògān wèntí de jiěshì*, Chinese version available

- (1) Venue for claims concerning the right of reputation (I.).
- (2) Handling disputes referring to documents of public agencies (II., IV.&V.).
- (3) Handling disputes referring to the press (III., VI.&VII.).
- (4) Right of reputation violations by medical units concerning diseases like AIDS etc. (VIII.).
- (5) Right of reputation cases relating to criticism of product or service quality (IX.).
- (6) Determination of economic losses (X.).
- (7) Handling right of reputation disputes relating to other civil disputes (XI.).

Even though the SPC's explanations offer an interesting reading, they are probably of little practical value.

According to Article 1 of the "Interpretation of the Supreme People's Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts"³⁷, which came into force as of March 10, 2001 emotional damages can be claimed in cases of the violation of the right of reputation. However, according to the said interpretation no monetary compensation should be given if the tortuous act that caused the mental suffering is not deemed to have had "serious consequences", rather, non monetary relief should be granted, i.e. an order of cessation to the infringer, rehabilitation of reputation, apology, etc.

As the Interpretation of the SPC doesn't give any specifics as to what is to be understood by "serious consequences" nor does it state precise guidelines for calculating monetary compensation for emotional damages. Hence, the courts enjoy a considerable amount of discretion when deciding on monetary compensation in case of a infringement on the right of reputation. Another clause of interest is Article 7 of the aforementioned SPC Interpretation according to which relatives of a deceased whose right of reputation has been infringed upon have the right to sue for emotional damages as well.

Most recently, the Chinese lawmaker seems to be preoccupied with the internet, as reflected by the 2015 amendment of the Article 246 Criminal Code discussed above. Not surprisingly, the SPC issued an interpretation on its own:

at www.npc.gov.cn/huiyi/lfzt/qqzrfca/2008-12/21/content_1462860.htm. As to the history of the Interpretation see CHIN, Defences, p. 7 et seq.

37 最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释, *Zuìgāo Rénmín Fǎyuàn guānyú quèdìng mínhì qīnquán jīngshén sùnhài péicháng zérèn ruògān wèntí de jiěshì*, Chinese version available at http://www.law-lib.com/law/law_view.asp?id=589.

the “Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in the Trial of Cases involving Civil Disputes over Infringements upon Personal Rights and Interests through Information Networks”³⁸ of June 23, 2014. Despite their novelty, the provisions therein are of little interest, and it remains to be seen, whether they will be taken into account in actual cases.

To sum it up, the SPC has shown a lot of activity as far as the right of reputation is concerned, with little practical consequences, though, as the cases discussed below show.

IV. CASES

A. Introduction

China strictly adheres to Montesquieu’s idea that “The judges of the nation are only the mouth that pronounces the words of the law, inanimate beings who can neither moderate the strength or rigor of the law.”³⁹ An exemplary case is the “Seed Case” where a judge declared a provincial law that was in conflict with national law invalid and was reprimanded for committing a serious political mistake⁴⁰.

Although case law is not recognized as a source of law in the PRC, and despite the fact that legal reasoning techniques are very much different from the cases published by Anglo-american or Western European Courts, Chinese case law helps to understand the letter of the law to some degree. From the cases discussed below, it can be concluded, for instance, that the term ‘reputation’ encompasses the appraisal of a person as to his morality, ability, fame, creditworthiness, image, etc.⁴¹, and that ‘insult’ means that a person’s personality or reputation is publicly damaged or destroyed⁴². ‘Libel’ (or slan-

38 最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定, *Zuìgāo Rénmín Fǎyuàn guānyú shěnlǐ lìyòng xìnxī wǎngluò qīnhài rénshēn quányì mínshì jiūfēn ànjiàn shìyòng fǎlǚ ruògān wèntí de guīdìng*, Chinese version available at <http://www.chinacourt.org/law/detail/2014/08/id/147944.shtml>.

39 «Les juges de la nation ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés, qui n’en peuvent modérer ni la force ni la rigueur.»

40 New York Times, November 28, 2005 (http://www.nytimes.com/2005/11/28/world/asia/a-judge-tests-chinas-courts-making-history.html?_r=0).

41 See i.e. Yu Yizhong vs. The News and Publication.

42 See i.e. Yu Yizhong vs. The News and Publication.

der) means damaging another person's reputation by disseminating rumours or stories fabricated out of thin air⁴³. From the case of Ni Peilu and Wang Ying vs. China World Trade Center (see below) it can be inferred that the right of reputation can also be infringed upon if the general public doesn't learn about it. But, above all, the cases show the vast difference in legal culture and legal reasoning that reflects in the jurisprudence despite the letter of the law being largely similar to the Western blueprints.

The cases below, presented in chronological order, summarize the facts and the reasoning of the courts. It may appear to the reader that there are gaps in the legal reasoning. This is not due to unfaithful translation of the author from the original source (the SPC Gazette), but due to the usual style of Chinese court rulings.

B. Summaries of Cases

1. Xu Liang vs. Shanghai Culture and Art Newspaper Office and Zhao Weichang⁴⁴

The case of Xu Liang vs. Shanghai Culture and Art Newspaper Office and Zhao Weichang was decided on by the Jing'an District Court of Shanghai Municipality on October 10, 1988, and by the Intermediate People's Court of Shanghai Municipality on December 31, 1988.

The plaintiff, an army serviceman, had participated as a singer in a party and had accepted the remuneration bestowed upon him, without asking for a particular amount of money. Later on, a young journalist, Zhao Weichang, published an article stating the following: "When a news unit invited a Lao Mountains hero and model serviceman who had captured the respect and love of the broad masses with his moving songs to participate in the Shanghai Youth Golden Autumn Evening Party, this heroic person charged 3,000 Yuan and not one Fen less. Despite the repeated explanation by people from the newspaper office that it would pay the remuneration according to the circumstances viewing on matters such as limited funds, he insisted on the charging." Xu Liang felt insulted by this and asked for a public apology.

43 See i.e. Yu Yizhong vs. The News and Publication.

44 徐良诉《上海文化艺术报》、赵伟昌侵害名誉权纠纷案, SPC Gazette, Issue 4, 1990.

The Basic People's Court held that Zhao Weichang's article and the Newspaper publishing it had infringed on the plaintiffs right of reputation by spreading this untrue story and ordered a public apology to be made as well as economic losses incurred due to the litigation to be compensated. As the plaintiff hadn't asked for moral damages, none were bestowed to him. The Intermediate People's Court upheld the judgement.

2. Wang Faying vs. Liu Zhen and Four Magazines Including Women's Literature⁴⁵

The case of Wang Faying vs. Liu Zhen and Four Magazines Including Women's Literature was decided on by the Intermediate People's Court of Shijiazhuang Municipality, Hebei Province on October 27, 1988, and by the Higher People's Court of Hebei Province on June 5, 1989 respectively.

In a newspaper article in the Qinhuangdao Daily – reprinted later in People's Daily – Wang Faying, a former statistician of an Agricultural Machinery Company in Funing County, was portrayed as someone fighting against malpractice.

Liu Zhen felt the newspaper article wasn't correct and brought difficulties to Funing County, therefore she wrote a “documentary” to expose Wang Faying. In the article, Liu Zheng described Wang Faying with words like “goblin, big monster, gangster, mad dog, political swindler, pickpocket, rebel, special product produced by Jiangxi province, local tyrant all along, little chili, person specializing in seeking personal gains, South chicken in piquant sauce and wrestle actress”.

Liu Zheng's article was published in four different magazines and Liu Zheng even reaped several hundred RMB worth of contribution fees. Wang Faying claimed compensation for the infringement on her right of reputation, while Liu Zheng claimed her article was based on interviews which faithfully reported about Wang Faying.

The Intermediate People's Court held the article was written and distributed to humiliate Wang Faying and thus infringed on her right of reputation. The defendants were to publish an apology statement and each pay amounts for moral damages between RMB 1,400 (Liu Zheng) and 400 RMB. Upon appeal by the defendants the Higher People's Court sustained the Intermediate People's Court's judgement.

45 王发英诉刘真及《女子文学》等四家杂志侵害名誉权纠纷案, SPC Gazette, Issue 2, 1989.

3. Ni Peilu and Wang Ying v. China World Trade Center⁴⁶

The case of Ni Peilu and Wang Ying vs. China World Trade Center was decided by the Chaoyang District People's Court of Beijing Municipality on November 18, 1992.

The plaintiffs, two young women, complained that when shopping at Wellcome Supermarket affiliated to China World Trade Center, they were asked by two male employees of the Supermarket to untie buttons of their clothing and open bags for checking, because they were suspected of stealing. The two plaintiffs felt this was an insult and damaged their reputation. The defendant argued that there was a display at the store entrance saying the shop had the right to search bags of customers and the plaintiffs had accepted this rule by entering the store. Furthermore the defendant argued that since the public reputation of the plaintiffs was not diminished the search did not constitute an infringement on the right of reputation.

The District People's court held that the Supermarket couldn't just assume a right by posting a display at the store entrance, as there were no legal grounds to do so. The court pointed out that if the defendant's employees suspected the plaintiffs of stealing, they should have submitted the matter to the legal organs to handle. As to the concept of the right of reputation the court explained: "For a citizen, reputation means the people's certain social evaluation of his moral character, competence, reputation, credit, etc. in light of his performance in his work, daily life, opinion presentation and other sides; and human dignity means self awareness and self evaluation of social status and social values by the citizen himself. The right of reputation empowered by law is a kind of personal right and closely connects with the reputation and dignity of citizens."

The court concluded that the reputation of the plaintiffs had been infringed on because the way of acting of the defendant's implied accusing them of being thieves, so their social status was belittled. The case was finally settled through mediation, the defendant offered an apology and paid RMB 1,000 in moral damages to the plaintiffs.

46 倪培璐、王颖诉中国国际贸易中心侵害名誉权纠纷案, SPC Gazette, Issue 1, 1993.

4. Li Lin vs. Cenozoic Era Magazine and He Jianming⁴⁷

The case of Li Lin vs. Cenozoic Era Magazine and He Jianming was decided on by No. 1 Intermediate People's Court of Beijing on December 6, 1996, and by the Higher People's Court of Beijing Municipality on March 21, 1997.

The plaintiff, Li Lin, was the daughter of Li Siguang, a famous geologist. He Jianming published a feature in Cenozoic Era Magazine portraying Li Siguang as being unfair to other geologists, even implying he was responsible for another geologist's suicide during the Cultural Revolution.

The Intermediate Court held that He Jianming had failed to prove the accusations in the feature were based on historic facts and that the article led the public to make derogatory appraisals of Li Siguang and had therefore injured his right of reputation. The Court held furthermore that Li Lin suffered mental damages due to the injury to her father's reputation. He Jianmin and the Cenozoic Era Magazine were to publish an apology and pay each RMB 5,000 in moral damages.

5. Peng Jiahui v. Chinese Story⁴⁸

The case of Peng Jiahui vs. Chinese Story was decided by the Intermediate People's Court of Chengdu City and by the Higher Court of Sichuan Province at an unknown date in 2001 and 2002.

The plaintiff, a roughly one hundred years old lady, complained that a publication of the defendant didn't present the history of her brother Peng Jiazheng, a "martyr" in the 1911 revolution. The defendant, Chinese Story, had already made a public apology and published a special article in commemoration of Peng Jiazhen and adopted other measures. Still Peng Jiahui felt that wasn't enough and asked for a more in-depth apology as well as compensation for spiritual losses of RMB 465,000 plus RMB 38,550 of physical losses.

The Intermediate People's Court ordered Chinese Story to pay RMB 50'000 in emotional damages but held that Peng Jiahui had failed to prove physical losses like hospitalisation. The court of the second instance upheld the decision.

47 李林诉《新生界》杂志社、何建明侵害名誉权纠纷案, SPC Gazette, Issue 1, 1998.

48 彭家惠诉《中国故事》杂志社名誉权纠纷案, SPC Gazette, Issue 6, 2002.

6. Zhang Jing v. Yu Lingfeng⁴⁹

The case of Zhang Jing vs. Yu Lingfeng was decided on by the People's Court of Gu Lou District of Nanjing City on July 16, 2001.

Zhang Jing is an internet aficionado who used to appear on the "xici.net" website of Nanjing under the net name of Hong Yanjing. She met the defendant, Yu Lingfeng, a.k.a. Hua Lingfeng, at a net surfers' party. The plaintiff claimed the defendant posted many articles under the net name "Da Yaojin" to insult her personal dignity. She demanded the cessation of infringement, elimination of bad effects and an apology as well as compensation of RMB 10,000 moral damages. The defendant claimed there was no proof that "Da Yaojin" was really him, because his ID could have been stolen, furthermore he argued that Zhang Jing's reputation in real life had not been infringed upon and a fictitious net subject had no right of personality.

The District Court explained that the "Internet is the product of technology development, and it has played an important role in promoting the advance of the human society. Though the net space is fictitious, the acts reflected by the doings on the net are real." The District Court referred to the Standing Committee's Decision on Protecting the Internet Safety Art. 6 (2) which reads: "Those infringing upon the legal rights and interests of others by using the Internet and constituting civil infringement shall bear civil liabilities." The District Court concluded that the internet isn't a lawless space. The Court held the identity of Hong Yanjing was no longer fictitious because other surfers knew Zhang Jing had assumed this name and the communications were no longer limited to the net space but also hold in real life.

The District Court concluded Yu Lingfeng had infringed on Zhang Jing's right of reputation but found that a compensation of RMB 10,000 would be too much, namely because the plaintiff had ridden a counter-attack on the defendant on the same website. The District Court ordered the defendant to apologize to the plaintiff and pay RMB 1,000 in moral damages. As no party appealed, the judgement came into force.

49 张静诉俞凌风网络环境中侵犯名誉权纠纷案, SPC Gazette, Issue 5, 2001.

7. Yu Yizhong vs. The News and Publication⁵⁰

The case of Yu Yizhong vs. The News and Publication was decided on by the Gu Lou District People's Court of Nanjing City on August 20, 2002 and by the Intermediate People's Court of Nanjing City on November 7, 2002 respectively.

The plaintiff, Yu Yizhong, a literature professor at Nanjing University, criticized the book "The making of Steel" and the TV-play made out of this book by the defendant, a newspaper office. In a newspaper article accompanied by an editorial, the defendant counter-criticized Yu Yizhong, putting his academic background and his political attitude into question. Yu Yizhong claimed, he was so irritated and worried by the defendant's publication that he failed to complete his scientific research project according to schedule and his family life was affected as well. The defendant held, it did not oppose an academic discussion but insisted on a prudent attitude to be adopted by academics, as the criticism of the plaintiff contained a total repudiation of the work "The making of Steel", it thought appropriate to start a public discussion about this.

The District People's Court held that the newspaper article contained no fabricated facts, therefore slander (libel) was not a given; further it held that there was no insult either, because the article contained no wording that would injure Yu's personality or reputation. The District People's Court pointed out that social sciences are developed through debate and argumentation and different opinions, even when aired with a severe wording, should be tolerated. The Intermediate People's Court sustained the District People's Court's decision.

8. Li Haifeng, et al. vs. Yeji Public Security Branch Bureau and Anhui TV Station, et al.⁵¹

The case of Li Haifeng, et al. vs. Yeji Public Security Branch Bureau and Anhui TV Station et al. was decided on by the Bao He District People's Court of Hefei City on October 17, 2005 and by the Intermediate People's Court of Hefei City on March 15, 2006 respectively.

The plaintiffs were six high-school students asked for help in a police line-up at Yeji Public Security Branch Bureau in a rape case. The line-up was filmed and the Anhui TV Station was given a copy of the tape, which was then used for broadcasting. In the TV-feature the faces of the six students were not

50 余一中诉《新闻出版报》社侵害名誉权纠纷案, SPC Gazette, Issue 2, 2003.

51 李海峰等诉叶集公安分局、安徽电视台等侵犯名誉权、肖像权纠纷案, SPC Gazette, Issue 2, 2007.

covered and it looked as if they were suspects in the rape case – which they weren't. Following the broadcast the plaintiffs were seen as rape offenders by some people.

The District Court held that the social appraisal of the plaintiffs was degraded by the broadcast of Anhui TV Station and their right of reputation injured. It also stated that the Yeji Public Security Branch Bureau, even if justified in cooperating with the Media, was obliged to have the tape technically treated before handing it over to the TV Station.

The district court ordered Yeji Public Security Branch Bureau and Anhui TV to make public apologies to the plaintiffs and pay each of the plaintiffs RMB 6,000 in moral damages. The Intermediate People's Court sustained the District People's Court's decision.

9. Xu Kai vs. Shanghai Baosteel⁵²

The case of Xu Kai vs. Shanghai Baosteel Metallurgical Construction Corporation (SBMCC) was decided by the People's Court of Baoshan District, Shanghai on Mai 15, 2006 and by No. 2 Intermediate People's Court of Shanghai Municipality on August 14, 2006.

Xu Kai resigned from his job with SBMCC in January 2001. Afterwards, he found it hard to find a new job, the potential employers first wanting to hire him but then refusing to do so on various pretexts. In 2005 he learned that the reason must have been that the potential employers believed that he had been dismissed by SBMCC because of disobedience to labour discipline. It turned out SBMCC didn't notice that Xu Kai had resigned, because he had handed his resignation to his superior instead of the office in charge. SBMCC rescinded the labour contract only in May 2001 because the Xu Kai was "missing" from his workplace. Apparently, SBMCC handed a copy of the dismissal notice to the local "Labour Service Center", but Xu Kai only received the notice of dismissal in 2005.

The plaintiff demanded the cessation of infringement upon his right of reputation, a formal written apology, compensation for unemployment amounting to RMB 29,340 (calculation based on minimum wage for a total of 50 months from 2001 to 2005), as well as RMB 2,000 for emotional damages. SBMCC argued that, according to internal rules, Xu Kai shouldn't have handed in his

52 徐恺诉上海宝钢冶金建设公司侵犯名誉权纠纷案, *Xú Kǎi sù Shànghǎi Bào Gāng yějīn jiànshè gōngsī qīnfán míngyù quán jiūfēn àn*, SPC Gazette, Issue 12, 2006.

resignation to his superior but to the labour and personnel office of the company.

The District Court held it was Xu Kai's good right to believe that his resignation was valid as his superior had accepted it. Therefore the dismissal notice issued in May 2001 lacked ground and hurt Xu Kai's right of reputation.

The court considered that a compensation for moral damages of RMB 2,000 as well as an apology was appropriate. As to the actual damages it held the plaintiff had failed to prove that his troubles with finding work from 2001 to 2004 had anything to do with his bad work record. For this reason, Xu Kai only received compensation for 8 months in 2005. The Intermediate Court upheld the District Court's decision.

10. Chen Moumou v. Mo Baolan, Mo Xingming and Zhou Lili⁵³

On a morning in December 2011, 12-year-old student Chen Moumou from Baisha took two hairpins (priced at RMB 35 and RMB 25, respectively) and three pieces of candy (each RMB 2) at Wanbao Supermarket, hid them and left without paying. At the door of the supermarket she was stopped by staff named Mo Xingming and Zhou Lili. As a punishment, they used a rope to tie Moumou on a pole in front of the supermarket and hung a plate with the inscription "thief" around her neck. A great number of onlookers witnessed the spectacle.

The family of Moumou alerted the public security organs. Consequently, the two staff members were detained for 10 days and were fined RMB 500 as administrative punishment. Five days later, the county public security bureau decided that Moumou should not be penalized but be put under strict supervision of her guardians. On the day of the incident, the grandfather of Moumou had to be hospitalized and was diagnosed with acute bronchitis, the total medical expenses amounted to RMB 2,058.6 yuan. Consequently, Chen Moumou sued the supermarket's employees and their boss, claiming she (or her grandfather?) had suffered damages from post-traumatic stress disorder.

The Basic People's Court of Hepu County stated, that citizens enjoy the right of reputation and that their personal dignity is protected by law, such that damaging the reputation of citizens with insults, libel or other means is

53 陈某某诉莫宝兰、莫兴明、邹丽丽侵犯健康权、名誉权纠纷案, *Chén Mǒumǒu sù Mò Bǎolán, Mò Xīngmíng, Zōu Lìlì qīnfàn jiànkāng quán, míngyù quán jiūfēn àn*, SPC Gazette, Issue 5, 2015, available at <http://bhzy.gxcourt.gov.cn/info/1027/6281.htm>.

prohibited. Those rights are also apply to underage persons. The court took it for granted, that the bronchitis of the grandfather as well as post-traumatic stress disorder was caused by the shocking treatment of Moumou, and that the treatment was a infringement on both her right of reputation and her right of health. While Mo Baolan as the operator of the supermarket was not directly involved, he was still seen as responsible since he had hired the perpetrators Mo Xingming and Zou Lili. Hence, he was to bear joint and several liability. They were ordered to pay medical expenses, care, hospital food subsidies, transportation expenses, and mental solatium at a total of RMB 23,549.18 yuan. Furthermore, the three defendants were ordered to issue a written apology and post it at the main entrance of the supermarket for 7 days.

Upon appeal Beihai City Intermediate People's Court later confirmed the facts found in the first instance, dismissed the appeal and upheld the original verdict.

V. CONCLUSION

As to the law in the books, the rules applying to the right of reputation seem to be quite straightforward and complete.

The cases generally show, that the Chinese courts take the right of reputation serious. However, there seems to be a lack of awareness of interests to be counterbalanced. Interests to be counterbalanced include the need of the press to publicize stories, the right of consumers to criticize faulty products, and the utility of heated academic discussions. The Chinese courts hardly ever seem to take those competing interests into consideration and seem to favour black-and-white-decisions.

As far as the damages awarded go, it is hard to tell what criteria the courts apply. In some instances, damages seem ridiculously high, for instance in the case of *Peng Jiahui v. Chinese Story*. The same goes for the rules of causation: it is hard to see any causal relationship between Chen Moumou being exposed as a thief and her grandfather being hospitalized in the case of *Chen Moumou v. Mo Baolan, Mo Xingming and Zhou Lili*. In the same case it has not been explained in a satisfactory way, why Mo Baolan should be liable along with his employees.

Some particularities due to the Chinese culture also appear. The Confucian concept of filial piety is reflected in the fact that much weight is given to the right of reputation of the dead. It is safe to assume that in the case of *Chen Moumou v. Mo Baolan, Mo Xingming and Zhou Lili* the judges rather showed compassion with the grandfather than with the little thief herself.

Furthermore, some cases show that whoever questions heroes, puts himself at risk. This may have to do with the fact that the Communist Party is very sensitive as far as parts of history are concerned that are source of its legitimacy⁵⁴.

Some changes in society are also visible. In today's money-driven China, it is quite unthinkable that anyone would take note of a performer accepting a remuneration, such as in the case of *Xu Liang vs. Shanghai Culture and Art Newspaper Office and Zhao Weichang*.

Most surprising to western eyes looking at the case law is the fact that so much attention is still paid to (deceased) heroes and their relatives respectively. As to the moral damage payments, some awards seem to be ridiculously high, like in the case of *Peng Jiahui vs. Chinese Story*, while in other cases the courts don't seem very generous, like in the case of *Xu Kai vs. Shanghai Baosteel*.

54 ZHAO, Posthumous Reputation, p. 274.

On the whole, Chinese courts seem to take right of reputation cases seriously, but the legal standards remain vague, despite the fact that a formidable number of SPC interpretations have been issued since the enactment of the GPCL and despite the number of interesting cases handled by Chinese Basic and Intermediate Courts.

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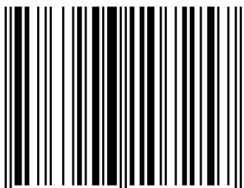
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Having and giving “face” has always been important in Chinese society. It is not surprising, therefore, that the right of reputation has found its place in the legislation of the PRC when laws were re-introduced in the 1980ies. While the legal provisions seem pretty straightforward, court cases show that the Chinese legal system and Chinese society are very much different from their counterparts in the West.

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ISBN 978-3-906107-25-7



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